

CAITUSAA

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 Plaintiff,

5 v.

12 CV 1866 (TPG)

6 ALL FUNDS AND OTHER PROPERTY  
7 ON DEPOSIT IN THE NINETEEN  
8 BANK ACCOUNTS LISTED ON  
9 ATTACHMENT A, AND ALL PROPERTY  
10 TRACEABLE THERETO, et al.,

11 Defendants.

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12 New York, N.Y.  
13 October 18, 2012  
14 4:00 p.m.

15 Before:

16 HON. THOMAS P. GRIESA,

17 District Judge

18 APPEARANCES

19 PREET BHARARA  
20 United States Attorney for the  
21 Southern District of New York  
22 ANDREW GOLDSTEIN  
23 HOWARD MASTER  
24 Assistant United States Attorneys

25 KASOWITZ, BENSON, TORRES & FRIEDMAN  
Attorneys for Claimant Kasowitz  
JOSHUA SIEGEL

COBURN & GREENBAUM  
Attorneys for Claimants Allen, Technodyne  
BARRY COBURN

THOMPSON, McGUIRE, WACHENFELD & BARRY  
Attorneys for Claimant Bank of America  
MARC PAKRUL

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1 (In open court)

2 MR. COBURN: Your Honor, just to make sure that, as  
3 your Honor's clerk just stated, this is on the record, I did  
4 and do expressly consent to the notion of starting my argument  
5 which your Honor was kind enough to let me do before the court  
6 reporter arrived.

7 For summary, I spoke to the issue of what is the legal  
8 issue here turning on the phrase, "In order to avoid criminal  
9 prosecution of the statute, the requirement of proof analogous  
10 to specific intent and the application of the summary judgment  
11 standard under Rule 56 in the absence of material fact."

12 Turning then to the circumstances themselves, the  
13 factual circumstances that are presented for your Honor, I --  
14 and like I said, your Honor, I will be very brief about this,  
15 in compliance with what your Honor stated at the beginning, but  
16 they are as follows from my point of view: First, there's the  
17 question of the timing of the Allens departure from the  
18 jurisdiction. It appears to be uncontested that Mrs. Allen  
19 left in February 2011 and Mr. Allen left in March 2011.  
20 There's no evidence to the contrary. That evidence is elicited  
21 from their declarations. The government does not appear to  
22 dispute it in their papers, and they submitted no  
23 countervailing evidence. So it is established that they left  
24 on those dates.

25 THE COURT: And they have not returned, right?

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1 MR. COBURN: Correct, they have not returned.

2 THE COURT: There was an indictment, right?

3 MR. COBURN: Indeed, subsequently there was an  
4 indictment.

5 THE COURT: When was the indictment?

6 MR. COBURN: In June, your Honor.

7 May I continue, your Honor?

8 THE COURT: Please.

9 MR. COBURN: The government asserts in its  
10 paperwork -- and this is an assertion which is made  
11 particularly, if I remember correctly, in its reply  
12 memorandum -- that the Allens fled to India while on subpoena.

13 My understanding of the facts -- and this is really  
14 drawn principally from the evidence provided by the government,  
15 but I think the Allen's declarations are consistent with it.  
16 The Allens received a subpoena dated December 14, 2010. The  
17 subpoena -- this is a grand jury subpoena, not one subpoena but  
18 more than one, several. They were returnable a month later on  
19 January 13, 2011, if I remember correctly.

20 It appears that the Allens did not in fact go into the  
21 grand jury, that their appearance before the grand jury was  
22 excused by the government, and instead, about two weeks hence,  
23 on January 27, 2011, on or about the government says  
24 January 27, 2011, the Allens had an informal meeting with the  
25 prosecutors.

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1 Now the prosecutors --

2 THE COURT: When was the informal meeting?

3 MR. COBURN: Sorry, your Honor?

4 THE COURT: When was the informal meeting?

5 MR. COBURN: According to the government's papers, on  
6 or about January 27, 2011.

7 And the government is dissatisfied with what the  
8 Allens said during this meeting. The Allens said they were  
9 completely forthcoming. The Allens say the only restriction  
10 and what they could say was subject matter restrictions that  
11 had been agreed upon by their counsel and the government in  
12 advance. The government disputes this. Regardless, a meeting  
13 did occur, and it appears that the subpoena then, which had  
14 been returnable for a grand jury appearance on January 13, a  
15 date that had already passed, that that subpoena essentially  
16 was of no further force and effect as far as I can tell from  
17 this record.

18 And then, like I said a moment ago, your Honor, the  
19 Allens left after that. This meeting like I just described was  
20 in January 2011. The Allens left in February and March 2011  
21 respectfully, and then there was another grand jury subpoena  
22 issued in April, mid April 2011 to the Allens, in which the  
23 government recites that they received a letter from one of  
24 Mr. Siegel's colleagues at Kasowitz Benson indicating that the  
25 Allens were going to take the Fifth.

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1           The reasons these dates are important, it is my  
2       submission, your Honor, is as far as I could tell from this  
3       factual record, the Allens -- "fled" is a loaded word the  
4       government submits in its advocacy, but the Allens did not  
5       leave while under subpoena, as far as I could tell. They  
6       received the subpoena, but they were not under subpoena when  
7       they left. Their explanation for why they left is described in  
8       great detail in their declarations, I will not impose on the  
9       Court's time in repeating that or even summarizing it, but my  
10      submission is it's pretty well comprehensive in terms of why  
11      they left relating to the fact that they could no longer earn  
12      an income.

13           THE COURT: Did they have a home here?

14           MR. COBURN: My understanding is, yes, they had a home  
15      here, your Honor.

16           THE COURT: They had a home.

17           MR. COBURN: They had more than one property here.

18           THE COURT: Where were their properties?

19           MR. COBURN: I know -- I apologize to the Court, I  
20      don't have detailed knowledge of the location of each of them,  
21      but they are detailed in the government's papers and in our  
22      notice of claim.

23           THE COURT: In other words, they lived in this country  
24      before they left this country. They lived here, right?

25           MR. COBURN: Yes.

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1 THE COURT: They had a home here or maybe more than  
2 one home.

3 MR. COBURN: Yes, indeed. I don't dispute that, your  
4 Honor, nor do they in their declarations. What their  
5 declarations say is that they left in February and March 2011,  
6 one after the other, for business purposes, for what was  
7 essentially supposed to be an extended routine business trip.  
8 And that while they were away, that's late winter and early  
9 spring 2011, they continued to cooperate with the government.

10 That's true, apparently that in May they invoked the  
11 Fifth with respect to certain documents, but they turned over  
12 other documents, according to their declaration. I don't see  
13 that that proposition is disputed. Moreover, they were asked  
14 to transfer \$1.9 million out of an account, which they did, and  
15 that's not disputed, as far as I know. So it appears both  
16 before and after their departure from the United States they  
17 cooperated in the investigation with respect to providing --

18 THE COURT: But they are not here to answer the  
19 indictment.

20 MR. COBURN: That is correct, your Honor.

21 THE COURT: That is the crucial thing. And here are  
22 two people who had a home here. It isn't that they would have  
23 to come and stay at the Waldorf Astoria to deal with the  
24 indictment, they had a home here, and they could return to that  
25 home. And there's been a lot of time, and I really just don't

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1 see that there's any real issue here about the timing. How  
2 could the timing make anything clearer? They are under  
3 criminal investigation, and they were indicted, and people who  
4 had been here before suddenly leave and don't return, that's  
5 the stark fact.

6 MR. COBURN: Well, it is true, your Honor, that there  
7 was an investigation. It is their testimony through their  
8 declarations that they did not know that that investigation was  
9 focused on them in particular at the time they left. Certainly  
10 they knew after they left that it was focused on them, and like  
11 your Honor indicated --

12 THE COURT: On a business trip going from February,  
13 March 2011. When is the business trip going to get over with?

14 MR. COBURN: Of course, your Honor, their declarations  
15 do not suggest that they have been on a business trip from  
16 February, March 2011 until now in 2012.

17 THE COURT: When are they coming back?

18 MR. COBURN: I personally do not have an answer to  
19 that question.

20 THE COURT: I'm sure you don't, because there's no  
21 indication that they intend to come back. They have plenty of  
22 time to come back.

23 MR. COBURN: If I could very quickly state this, your  
24 Honor, our central point, which I started saying before the  
25 court reporter arrived, is that since there is a requirement

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1 under the plain language of the statute as interpreted in the  
2 DC circuit case on which we relied, the \$6 million -- U.S.  
3 versus \$6 million case, there has to be proof analogous to  
4 specific intent, that they left and remained abroad in order to  
5 avoid criminal prosecution.

6 My submission to your Honor is that based on a host of  
7 circumstances, which if your Honor will allow me, I will  
8 continue to talk about, a host of circumstances that the  
9 government cannot prove, they cannot achieve the requisite  
10 level of proof under a summary judgment standard to suggest  
11 there is an absence of material fact as to what their specific  
12 intent was, what their motivation was. They have testified  
13 that they left for a business trip and they remain because  
14 they're no longer able to earn an income in the United States  
15 and their reputations have been tarnished and so on. And my  
16 submission to the Court is that there is not evidence to  
17 contradict those assertions, and that all the circumstances do  
18 not allow the government to carry its burden under the summary  
19 judgment standard.

20 THE COURT: It seems to me that the circumstantial  
21 evidence is so strong.

22 MR. COBURN: There are some others, which, if your  
23 Honor would allow me, I could point out quickly.

24 THE COURT: Of course.

25 MR. COBURN: I appreciate that very much.



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1           They testified that they left their money in the  
2     United States and their kids in the United States, which I  
3     submit to your Honor corroborates the notion that they left for  
4     business purposes initially. They left assets here. They  
5     received no evidence, no indication when they left that they  
6     were in fact a target of the investigation. Like I indicated a  
7     moment ago, they were asked while away to transfer nearly 2  
8     million at the government's request, they did so, they provided  
9     more documents to the government. The government then, in  
10    May 2011, froze their assets and subsequently indicted them  
11    while they were abroad. They described in great detail in  
12    declarations the nature of the economic dislocation that they  
13    suffered as a result from adverse press and frozen assets and  
14    so on, and they describe they remain India where they have  
15    financial support from relatives, that they were in the United  
16    States in early 2011 after other people started being arrested.  
17    They explained that with respect to funds that were paid to  
18    McCreedy they provided an innocuous rationale for why invoices  
19    that were deemed immediately due and owing had not been paid.  
20    They did not try to transfer substantial funds in other  
21    accounts which have now been frozen.

22           There's an affidavit or a letter, I should say, from a  
23    psychologist with respect to one of their daughters in terms of  
24    why the daughter should not now be taken out of India because  
25    of the emotional dislocation that she has suffered. And with

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1 respect to the other factors that the government relies upon,  
2 our meetings with them, the letter that I sent them, and what  
3 happened in the Kasowitz civil proceeding we'll just rely on  
4 what we stated in our papers with respect to that. My  
5 submission to your Honor is that none of those things prove  
6 anything in terms of the Allens' specific intent.

7 So for all those reasons, my submission to the Court,  
8 and I appreciate your Honor allowing me to speak to that, I do  
9 not believe the government has or can carry the requisite  
10 burden, and my submission is that your Honor should not  
11 exercise your discretion, and it is a discretionary call, even  
12 if all five prongs are demonstrated, your Honor should not  
13 exercise your discretion to impose this kind of extremely  
14 Draconian measure to impose.

15 THE COURT: I will put on the record right now my  
16 ruling. It will be a summary ruling and will not be lengthy.  
17 The factual materials that are quite fulsome have been  
18 furnished to the Court, but the essential facts are that the  
19 Allens left the United States, one in February 2011, the other  
20 in March 2011. There was a criminal investigation going on and  
21 there was an indictment in June, and they have not returned,  
22 despite the fact they had a home here, maybe even two homes,  
23 and they have not returned. And the circumstantial evidence at  
24 the very least is overwhelming to support the idea that they  
25 had notice or knowledge of the fact that there was a warrant or

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1 process for their apprehension, and they have remained outside  
2 of the United States in order to avoid criminal prosecution.  
3 And I'm, of course, referring to the requirements of the  
4 fugitive disentitlement statute codified at 28 USC 2466.

5 The Court finds that they purposefully left the  
6 jurisdiction of the United States and remained absent from the  
7 United States knowing that there was a criminal investigation  
8 and knowing that there was an indictment and a warrant for  
9 their arrest if they reentered. To say the least, the criminal  
10 case is related to the forfeiture action. It is not even  
11 contested that they are not in custody in any other  
12 jurisdiction. And as I believe I already said, the Allens are  
13 deliberately avoiding prosecution by declining to enter or  
14 reenter the United States and be subject to the jurisdiction of  
15 the United States.

16 Consequently, the Court finds that the United States  
17 government is entitled to forfeiture remedies that are sought  
18 in its action, and that the defenses and claims of the Allens  
19 are entirely without merit and do not prevent the government  
20 from obtaining the relief it seeks.

21 Now with that, I would like to adjourn, and if there  
22 are any other matters pertaining to the Bank of America or the  
23 law firm, I think now that the main issues are decided by the  
24 Court, you may be able to work out the issues with the other  
25 parties. If not, we can have an appropriate proceeding.

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1 Thank you.

2 MR. GOLDSTEIN: Thank you, your Honor. Just to be  
3 clear, I believe your Honor's order that you just stated covers  
4 this, but the claims were made not just by the Allens but by  
5 the company Technodyne itself.

6 THE COURT: I stand corrected on that.

7 MR. GOLDSTEIN: Thank you, your Honor.

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